No. 83-2011

In the Supreme Court of the United States

OCTOBER TERM, 1984

WILLIAM O. NISHIBAYASHI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether false statements contained in affidavits filed in a federal district court and with the National Labor Relations Board were "material" within the meaning of 18 U.S.C. 1621 and 1001 when no judicial or administrative hearings were held.

2. Whether the trial court erred in summarily denying petitioner's mid-trial motion alleging vindictive and selective prosecution.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A6) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 1984. The petition for a writ of certiorari was filed on June 6, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Hawaii, petitioner was convicted on three counts of perjury, in violation of 18 U.S.C. 1621, and one count of making false statements, in violation of 18 U.S.C. 1001. He was sentenced to concurrent terms of three years' imprisonment on each count. All but six months of the sentence was suspended in favor of three years' probation,

on the condition, inter alia, that petitioner serve the six months in a jail or treatment institution and pay a $1,000 fine. E.R., Tab C.R. 45.[1]

1. The evidence at trial showed that petitioner and Ralph Torres, both union officials, made false statements in affidavits filed in connection with a labor dispute. In January 1981, Walter Mungovan, the owner of C & W Construction, a general contracting firm in Maui, Hawaii, complained to the National Labor Relations Board office in Honolulu that the Carpenters Union was committing an unfair labor practice by picketing and threatening to picket his business for over 30 days for organizational purposes, without first having filed an appropriate petition with the NLRB (Tr. 36-38). If, as the union claimed, the picketing was informational, *i.e.*, intended not to organize but merely to advise the public truthfully about Mungovan's labor practices, the picketing was legal (Tr. 38).

Following an investigation, the NLRB filed suit against the union in the United States District Court for the District of Hawaii, seeking an injunction against the picketing. The district court ordered the union to respond to the Board's allegations by affidavit (S.E.R. 1-2). The union responded by filing an affidavit by petitioner, dated February 18, 1981, in which he described his investigation of Mungovan's construction projects and stated that Mungovan was not paying prevailing wage rates for carpentry work (S.E.R. 3-12).[2] Petitioner stated in the affidavit that "Local 745's only objective has been to have Mr. Mungovan comply with paying prevailing rates to his employees if they performed carpentry work" (S.E.R. 11).

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[1]"E.R." refers to the Excerpts of Record filed in the court of appeals; "S.E.R." refers to the Supplemental Excerpts of Record; and "Tr." refers to the trial transcript.

[2]This affidavit gave rise to the perjury charges in Counts 1 and 2 of the superseding indictment (E.R., Tab C.R. 13).

The NLRB failed to file affidavits with its complaint. The district court, acting in part in reliance on the union's affidavits, denied the Board's request for an injunction (S.E.R. 15-17, 18-20).

On March 2, 1981, Mungovan filed another charge against the union with the NLRB, claiming that the union had induced and encouraged individuals to engage in a strike, and had engaged in an illegal secondary boycott (S.E.R. 23). In response, the union submitted to the NLRB another affidavit executed by petitioner, dated March 5, 1981, in which he denied Mungovan's charges and stated that the only objective of the union's picketing of C & W Construction "has been to protest the substandard wages paid" (S.E.R. 24-25).[3] The union also submitted that affidavit to the district court in response to a second action brought by the NLRB against the union (see S.E.R. 21-22).[4] The NLRB proceeding and the district court action eventually were settled when the union agreed not to picket for a certain period of time (Tr. 53, 94).

Testimony by Mungovan and the head of the union and tape recordings of conversations between petitioner and Mungovan eventually established that the picketing of C & W Construction Co. was, contrary to petitioner's sworn submissions, intended to pressure Mungovan into signing a union contract. In meetings between petitioner and Mungovan in November and December 1980, petitioner repeatedly asked Mungovan when he was going to sign the union agreement; when Mungovan mentioned another non-union contractor, petitioner said they would make him sign even if they had to torch his jobs (Tr. 627, 635, 637). Neither

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[3]This affidavit gave rise to the false statement charge in Count 4 of the superseding indictment (E.R., Tab C.R. 13).

[4]This use of the March 5 affidavit gave rise to the perjury charge in Count 3 of the superseding indictment (E.R., Tab C.R. 13).

petitioner nor any other union agent ever discussed substandard wages and benefits with Mungovan (Tr. 629, 639, 673-674, 686). On the day Mungovan told petitioner he did not intend to sign the contract, the union sent Mungovan a letter stating that it would picket him (Tr. 638; S.E.R. 31).

Another union agent told Mungovan at one point that all the union was trying to do was to organize him (Tr. 661; S.E.R. 33-34) and that the union did not think Mungovan was paying substandard wages (S.E.R. 33; Tr. 779). Walter Kupau, the head of the union, admitted that he advised Mungovan, in a conversation in which they never discussed substandard wages, that the only way to settle the dispute was to sign an agreement (Tr. 368-371). Kupau also told Mungovan that "these business agents are doing a better job of organizing than any other business agents" (Tr. 372).

In a recorded conversation between petitioner and Mungovan on February 3, 1981, the two men talked extensively about whether Mungovan would sign a union contract (GX 42; S.E.R. 35-54). Petitioner told Mungovan that the union had signed eight contractors without picketing; petitioner made it clear that the union was determined to get Mungovan to sign an agreement and that this was the only way to end the picketing. The February 3 conversation did not include any discussion about substandard wages and benefits.

2. The court of appeals affirmed in an unpublished opinion (Pet. App. A1-A6). The court concluded, inter alia, that petitioner's false statements were material to the NLRB and district court proceedings, since the issue in those proceedings was the union's intent in picketing (*id.* at A2), and that petitioner's claims of vindictive and selective prosecution were barred because they were not raised prior to trial (*id.* at A4).[5]

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[5]On July 11, 1984, Justice Rehnquist denied petitioner's application for a stay of the mandate in this case.

ARGUMENT

1. Petitioner contends (Pet. 5-6) that the court of appeals erred in concluding that his false statements were material, since no judicial or administrative hearings or other deliberations were ever conducted. That contention is clearly without merit. The unpublished decision of the court of appeals does not warrant further review.

The court below applied the same test of materiality that other courts of appeals have consistently employed. As the court below noted (Pet. App. A2), that test is a broad one —whether the false statement was capable of influencing the tribunal on an issue before it. It is not necessary to show that the statement actually impeded an investigation or that it related to the primary subject of the investigation. It is enough to prove that the statement was relevant to any issue under consideration and that the falsity of the statement would have the natural tendency to influence the investigation or determination of the tribunal. See, *e.g.*, *United States* v. *Carrier*, 654 F.2d 559, 561 (9th Cir. 1981); *United States* v. *Ponticelli*, 622 F.2d 985, 989 (9th Cir.), cert. denied, 449 U.S. 1016 (1980); *United States* v. *Giarratano*, 622 F.2d 153, 156 (5th Cir. 1980); *United States* v. *Howard*, 560 F.2d 281, 284 (7th Cir. 1977); *United States* v. *Whimpy*, 531 F.2d 768, 770 (5th Cir. 1976). All of the cases cited by petitioner (Pet. 5-6) have employed this standard formulation of materiality.

The court of appeals was clearly correct in concluding that petitioner's statements satisfied the traditional test for materiality. As the court pointed out (Pet. App. A2), the union's intent in picketing was at issue in all of the proceedings in this case. Petitioner's false statements that the union was picketing to protest substandard wages were obviously material, since they could have influenced the determinations of the NLRB and the court concerning the union's intent.

Petitioner contends, however, that his statements could not have been material because the tribunals in which he filed his affidavits never conducted any proceedings or deliberations. Petitioner apparently is referring to the fact that both the court actions and the proceedings before the NLRB eventually were dismissed or settled without any evidentiary hearings. But the fact that no such hearings were held does not mean that petitioner's affidavits were not capable of influencing the tribunals with which they were filed. Indeed, the district court specifically ordered filing of the affidavits in connection with its determination whether to grant the injunction requested by the Board, and it dismissed the NLRB's initial suit for injunctive relief in reliance on the first affidavit of petitioner submitted by the union. The false statements in the affidavits also had the capacity to affect the disposition of the second action filed by the Board, including the outcome of settlement negotiations. Thus, although the district court concluded that it was unnecessary to hold an evidentiary hearing, there is no doubt that petitioner's statements were made in connection with court proceedings and that they had the capacity to influence (and in fact did influence) the disposition of those proceedings.

The false statement charge involving the affidavit submitted to the NLRB was brought under 18 U.S.C. 1001. Section 1001 does not require that a false statement be made in the course of administrative hearings; statements that affect an agency's investigative functions may form the basis for a Section 1001 violation. See *United States* v. *Rodgers*, No. 83-620 (Apr. 30, 1984). Petitioner's false statement about the union's motive in picketing was clearly material to the Board's investigation of Mungovan's charges, since it could have affected the outcome of that investigation.

2. Petitioner also contends (Pet. 7-8) that the district court erred in summarily dismissing as untimely his motion claiming vindictive and selective prosecution. Petitioner cites *Fallen* v. *United States*, 378 U.S. 139 (1964), in support of his claim that the court should have considered the circumstances that caused his late filing of the motion, instead of applying the rules of procedure inflexibly. But in fact the district court did consider petitioner's substantive arguments. The court concluded that the information petitioner offered in support of his claim showed only some contradictory testimony and clearly did not make out a vindictive or selective prosecution claim (E.R., Tab T.1, at 601-604). The court quite properly declined to conduct any further hearing on this patently invalid claim.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6]In any event, the court of appeals was clearly correct in concluding (Pet. App. A4) that petitioner's claims need not be considered because they were not raised prior to trial, as required by Fed. R. Crim. P. 12(b). Petitioner makes the conclusory statement (Pet. 7) that his claims were based on facts uncovered during trial; however, he does not state what those facts were or explain why they were necessary predicates to his claims of vindictive or selective prosecution. Of course, petitioner's situation in no way resembles that of the incarcerated petitioner in *Fallen*, who, acting without the benefit of counsel, missed the 10-day deadline for filing of a notice of appeal because a prison mailing system operated in a manner that was beyond his control.

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